

**CITATION:** Kalair v. Naimark, 2026 ONSC 829  
**COURT FILE NO.:** CV-24-00722558-00CP  
**DATE:** 20260211

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** OMAR KALAIR, Plaintiff

– and –

RYAN NAIMARK and RYAN NAIMARK PROFESSIONAL CORPORATION  
o/a NAIMARK LAW FIRM, Defendants

**BEFORE:** Justice E.M. Morgan

**COUNSEL:** *Peter Waldmann and Petia Draguieva*, for the Plaintiffs

*Ethan Schiff, Michael Eizenga, and Sidney Brejak*, for the Defendants

**HEARD:** January 30, 2026

**MOTIONS TO DISMISS AND AMEND/SUBSTITUTE**

[1] The Defendant in this proposed class action moves under section 29.1 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”) to dismiss the action for delay.

[2] The Plaintiff moves to amend the Statement of Claim and to substitute two new Plaintiffs in place of the original Plaintiff who is resigning from that role.

**Motion to dismiss for delay**

[3] Section 29.1 of the CPA provides that the action is to be dismissed unless, after one year from the issuance of the claim,

(a) the representative plaintiff has filed a final and complete motion record in the motion for certification;

(b) the parties have agreed in writing to a timetable for service of the representative plaintiff’s motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding, and have filed the timetable with the court;

(c) the court has established a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding; or

(d) any other steps, occurrences or circumstances specified by the regulations have taken place.

[4] There was at one time a debate among Superior Court judges as to whether the requirements of section 29.1 left any flexibility in the hands of judges to relieve plaintiffs who faced dismissal of their action for failure to accomplish the steps set out therein: see *Lubus v. Wayland Group Corp.*, 2022 ONSC 4999, at para. 40, leave granted 2023 ONSC 239 (Div. Ct.). Since that time, however, the Court of Appeal has definitively resolved the question.

[5] In *Tataryn v. Diamond & Diamond Lawyers LLP*, 2025 ONCA 5, at para. 61, the Court stated that, without exception, "there is no judicial discretion engaged in the one-year time parameter". The requirements in section 29.1 are to be strictly applied.

[6] The Notice of Action with which the present claim was commenced was issued on June 21, 2024. No written timetable was established for certification, either by written agreement of the parties or by an endorsement issued by the court. Two weeks before the one-year deadline, on June 6, 2025, Plaintiff's counsel delivered a motion record for certification to Defendants' counsel. However, the certification motion record was not immediately filed with the court.

[7] In an endorsement dated December 18, 2024, I had set the date of January 26, 2026 for pre-certification motions dealing with pleadings along with the Plaintiff's plan to substitute a new representative Plaintiff and other preliminary matters. But had not set a date for a certification motion and so there was no hearing date noted on the record as served.

[8] On June 9, 2025, Plaintiff's counsel advised the Court (by email to my assistant, with a copy to Defendants' counsel) that they had some issues with uploading the certification record to Case Centre, but that they had managed to do so by using the January 26, 2026 date, which was only supposed to be for pre-certification matters, as the hearing date for the certification motion. Case Centre, however, is a separate facility from the Court's motions office; uploading material there does not dispense with the need to file motion materials with the Court office.

[9] On June 16, 2025, with a follow-up email on June 24, 2025, Defendant's counsel responded to Plaintiff's counsel's correspondence and objected to using January 26, 2026 as a hearing date for certification. They pointed out that that one day had been agreed to for the hearing of pre-certification matters only.

[10] On June 24, 2025, the same day as Defendants' counsel's follow-up response was received, my assistant, on my instructions, and in an effort to assist counsel in overcoming a filing technicality, wrote to all counsel:

For the purposes of s. 29.1 of the CPA it is acceptable for Mr. Waldmann to use the January 26, 2026 motion date in order to get the certification motion material

filed. But I agree with Mr. Brejak that we will in due course have to re-schedule certification. January 26<sup>th</sup> will be consumed with pleadings and other pre-certification matters, and the hearing of the certification motion will have to wait until the outcome of those preliminary matters.

[11] In reliance on this email, Plaintiff's counsel indicated on his motion materials that certification was scheduled for January 26, 2026, and was then able to file his motion record. But, as I now track the sequence of correspondence, by that time it was, strictly speaking, too late to satisfy section 29.1(a) of the *CPA*. The Notice of Action had been issued on June 21, 2024, but the email that facilitated his filing of the certification record was sent to him on June 24, 2025 – i.e. 3 days after the one-year anniversary of the commencement of the action.

[12] Plaintiff's counsel understood the June 24, 2025 email from the Court to mean that a timetable for certification had been discussed at least to a degree that was sufficient to have satisfied – or, perhaps, to have waived – the one-year deadline. At the hearing of this motion, Plaintiff's counsel referred to my assistant's email as an “endorsement” to that effect, thereby qualifying as a formal timeline for certification in satisfaction of section 29.1(c) of the *CPA*. I hastened to advise him that this type of scheduling exchange by email correspondence with the court is done for the convenience of counsel and the docket-setting staff in the civil motions office; but it does not amount to a substantive judicial decision or endorsement.

[13] Having said that, Plaintiff's counsel's understanding was, at bottom, the result of a miscommunication between the Court and him. I therefore do not fault Plaintiff's counsel for coming to that conclusion. The email that he received did seem to indicate that the Court had determined that the *CPA*'s deadline had been met by the filing date. And while the one-sentence email could not be construed as a full, Court-endorsed timetable worked out for the parties as envisioned by section 29.1(c) of the *CPA*, it looked like an acknowledgment that the Plaintiff had met the statutory deadline unilaterally by filing a certification record in satisfaction of section 29.1(a) – i.e. without either an agreement with the Defendants or a Court-endorsed timetable.

[14] But the narrative does not end there. What was clear in the correspondence between counsel and my office was that the concern was merely with the filing date. Nothing was said about the contents of the Plaintiff's certification motion, and no review or examination of the certification record was conducted. Accordingly, even if the one-year filing date was satisfied by the filing of the certification record by Plaintiff's counsel on June 24, 2025 (or shortly thereafter), the question remains as to whether what was filed qualifies as a “final and complete record in the motion for certification” as required by s. 29.1 of the *CPA*. The statute is clear that it is not enough to file a record that later needs to be supplemented; it must be final and complete.

[15] To reiterate the starting point for this consideration of section 29.1, the Court of Appeal has eliminated any discretion to alleviate parties of the strict requirements of the section. Accordingly, while a case management judge can set a schedule for certification within the one-year statutory timeline, the filing of a partial or incomplete motion record for certification would not satisfy the statutory provision no matter how timely the filing of that partial record might be. It would take a hearing, with substantial submissions on both sides of the issue, to determine

whether the certification motion was indeed “final and complete” in the way contemplated by the statute. And if the record were found to be incomplete, the Court would not have the discretion to extend the deadline any further.

[16] It turns out that the certification record filed by Plaintiff’s counsel on June 24, 2025 was, in fact, incomplete. It contained no litigation plan – an indispensable requirement under section 5(1)(e)(ii) of the *CPA* for any certification motion record.

[17] Although the point is an obvious one, it is worth recalling that a litigation plan that is unworkable, or that contains little more than boilerplate, does not satisfy the statutory requirement: *Carcillo v. Ontario Major Junior Hockey League*, 2025 ONCA 652, at paras. 61-62. It follows, therefore, that the complete absence of any litigation plan certainly renders the certification record incomplete. As has been said in respect of previous certification records with a similar omission, “[a] deficient litigation plan can... be rectified. No litigation plan, however, fails to meet the basic requirements of the *CPA*.’ It would be an error to dispense with the requirement for a litigation plan”: *Bartholomew v. Coco Paving Inc.*, 2019 ONSC 2919, at para. 40 (Div. Ct.), quoting 2017 ONSC 6014, at para. 55 (SCJ).

[18] On December 1, 2025 – i.e. 6 months after the Plaintiff had filed the certification record – the Defendants served their factum as moving party in the present motion to dismiss the action. Understandably, Defendants’ counsel pointed out in their factum that regardless of the date on which the Plaintiff had filed his certification motion record, the Plaintiff’s record was only a partial record since it lacked a litigation plan. A “final and complete motion record for certification” as required by section 29.1(a) of the *CPA* was therefore still not filed at that point – i.e. some 18 months after commencement of the action.

[19] On December 28, 2025, Plaintiff’s counsel served a responding factum in this motion. In an effort to somehow remedy the deficiency in the Plaintiff’s certification record, Plaintiff’s counsel appended a proposed litigation plan as a Schedule ‘A’ to the factum. That was the first time Defendants’ counsel had seen any document produced by the Plaintiff that even purported to be a litigation plan.

[20] It is trite law that, “A document for use on a motion for summary judgment must be in the motion record, properly introduced through an affidavit that is subject to cross-examination. Evidence on motions cannot be introduced as a schedule to a factum”: *2174372 Ontario Ltd. v. Dharamshi*, 2021 ONSC 6139, at para. 131. The same logic applies to a motion for certification or, for that matter, any other motion – including, of course, a motion to dismiss under section 29.1 of the *CPA*. To use the most common phrase, a factum cannot become an after-the-fact vehicle by which to ‘cooper up’ a deficient motion record.

[21] In the bankruptcy law context, for example, the British Columbia Court of Appeal has said that, “Creditors who neglected to file proofs of claim in compliance with the requirements of s. 124 would suffer no practical consequences if, in Farley J.’s phrase, they could expect to ‘cooper up’ their proofs at a later date in court”: *Re Galaxy Sports, Inc.*, 2004 BCCA 284, at para. 41. Likewise, under Rule 20.01(2.2) of the *Rules of Civil Procedure*, “the Court should restrict itself

from ordering a mini-trial when a party has chosen to tender a deficient evidentiary record on a motion..., for a mini-trial ought not to permit a party to buttress or ‘cooper up’ its deficient record”: *Crisafi v. Urban Landmark Realty Inc.*, 2018 ONSC 191, at para. 58.

[22] In short, evidence which is necessary to a motion must be in the motion record, and cannot be added after the fact to an advocacy document like a factum that is not fit for that purpose. The certification record here was incomplete, and the critical omission cannot be remedied by inserting evidence into a factum.

### **Motion to amend the pleading and substitute Plaintiffs**

[23] Even if, as a matter of form, I were inclined to accept the litigation plan that appears as a schedule to the Plaintiff’s factum as part of the certification record – and, frankly, it is doubtful that I have that discretion given the strictness with which motion judges have been told to approach section 29.1 – I would not accept it as a matter of substance. The current Plaintiff, Omar Kalair, deposed that he worked on the litigation plan with his counsel. But Mr. Kalair has also deposed that he can no longer be the representative Plaintiff in this action as his time is entirely occupied with other professional and religious duties that he is engaged in.

[24] I take Mr. Kalair at his word in this respect. Whether or not he had any input to or discussions with counsel about a litigation plan that never materialized in the certification record is no longer relevant. As indicated at the outset of these reasons, the present motion by the Defendants to dismiss has been joined with a motion by the Plaintiff to substitute two new representative Plaintiffs in place of Mr. Kalair, who is no longer willing and able to continue in that capacity.

[25] The proposed new representative Plaintiffs do not appear to know anything about the litigation plan. In fact, they do not even seem aware of what a litigation plan is. Both proposed Plaintiffs, Tyler Couchman and Terrence Montrose, were cross-examined on their overall readiness to take on the duties of representative Plaintiff. Both of them professed ignorance of the litigation plan.

[26] It is well established in the case law that a litigation plan is a critical element for certification and that, although it may be a lawyer-drafted document, it is to reflect the plans of the representative plaintiff and is to be part of the representative Plaintiff’s evidence: *Carcillo*, at paras. 54-56; *Sullivan v Golden Intercapital (GIC) Investments Corp.*, 2014 ABQB 212, at paras. 49-55. As the Alberta court specifically noted in *Sullivan*, at para. 55, it is important that the litigation plan be that of the representative Plaintiff and not of counsel, “otherwise that person cannot be anything more than an empty vessel controlled by the litigation lawyer.”

[27] With this in mind, the testimony of the proposed representative Plaintiffs is telling. Mr. Couchman’s examination produced the following exchange on the subject of a litigation plan:

Q: Again, I will repeat it. What is the responsibility of the representative plaintiff in a class action?

A: Seek counsel?

Mr. Waldmann [for the witness]: At the moment, can you think of other things, at this moment? Does that help, Mr. Schiff?

A: At this moment?

Q: Anything else, Mr. Couchman?

A: That's it.

Q: Are you familiar with the requirement of a representative plaintiff to produce a litigation plan for the class action?

A: Can you repeat that one?

Q: Are you familiar with the requirement of a representative plaintiff to produce a litigation plan for the class action?

Mr. Waldmann: Perhaps you could explain to the witness what a litigation plan is.

Q: I would like an answer to the question as I've asked it.

Mr. Waldmann: I think your question is too technical or vague for a layperson to deal with. Tell him what a litigation plan is –

Q: Counsel, you can –

Mr. Waldmann: – and then ask him.

Q: – you can refuse my question and just put it on the record that it's refused if you want to. But you don't get to tell me what questions to ask.

Mr. Waldmann: Well, I'm just trying to help you Mr. Schiff.

Q: That's fine. I don't want your help. So I do want an answer to my –

Mr. Waldmann: I think you need it though.

Q: That's fine. I want an answer to my question, which is whether or not he understands the requirement of a representative plaintiff in a class action to produce a litigation plan.

Mr. Waldmann: Well, I think your question is –

Q: Counsel, either refuse what I'm asking –

Mr. Waldmann: I'm giving you my reasons for my refusal.

Q: Okay. So it is refused then?

Mr. Waldmann: It's refused, because normally representative plaintiffs simply ask their counsel to produce a litigation plan. And now, you're suggesting that it's the representative plaintiff that drafts the litigation plan. That's purely giving a false impression to the witness in order to try and elicit whatever answer you're trying to elicit. So I don't think the question is fair, Mr. Schiff.

[28] Mr. Montrose's examination on this topic was more of the same:

Q: Do you understand that a representative plaintiff is supposed to produce a plan to guide the procedure of the class action?

A: I understand that, I mean, I'm here to represent people who don't really can't make it and is relying on this thing to happen. And I was asked – I was asked to be at least a representative and I agreed to do it.

Q: Understood. Do you have a plan, though, for how the class action is supposed to proceed?

A: Well, that is why I took a lawyer to really help me out and show me where to go and what to do.

Q: Do you understand that as representative Plaintiff you would have the role of producing a plan to notify the class members about the class action?

Mr. Waldmann: I think he's answered that. In effect, he said that's why he has counsel.

Q: Well, I asked the first question about the litigation process specifically and now I'm asking specifically about the notification process. So it's a different question.

Mr. Waldmann: I think the answer is he's already given.

Q: I don't think so. It's a different question.

A: I mean, that's why I hire a lawyer to guide me, to show me how to go about doing this matter. All right. I put my faith in him. When we are here, we'll go through this matter and see where how to take it from here.

[29] What these exchanges tend to reveal is that Plaintiff's counsel is instructing his clients rather than the other way around. With the greatest of respect, the impression left by the newly

proposed representative Plaintiffs is that counsel is, or will be, conducting the litigation on his own, in effect without any real party or client to instruct him or for him to answer to.

[30] This impression is further augmented by the Plaintiff's motion to amend the pleading, which has been brought together with the Defendants' motion to dismiss. Paragraph 2 of the proposed Amended Statement of Claim relates that Terrence Montrose resides in the City of Toronto, Ontario and that Tyler Couchman resides in the City of Ajax, Ontario. Beyond that, the material facts relating to the two new Plaintiffs are peculiarly sparse. As former clients of the Defendants the two of them apparently share in the collective allegation that the Defendants overcharged for disbursements, and especially for photocopies, but that is a generic description of all of the Defendants' clients.

[31] Paragraph 9 of the proposed Amended Statement of Claim describes the matter for which the original (and now exiting) Plaintiff, Mr. Kalair, retained the Defendant law firm – a claim relating to an automobile accident that occurred on March 25, 2013 on Thorncliffe Park Drive. There is no indication in the pleading as to the matters for which either Mr. Couchman or Mr. Montrose retained the Defendants. Likewise, paragraph 10 of the proposed Amended Statement of Claim identifies the retainer agreement dated April 16, 2019 entered into between the original Plaintiff and the Defendants, but the proposed amended pleading does not identify a retainer agreement between either Mr. Couchman or Mr. Montrose and the Defendants.

[32] Paragraphs 11 and 12 of the proposed Amended Statement of Claim describe previous proceedings in which the original Plaintiff, Mr. Kalair, was involved and which purport to illustrate the difficult relationship between him and the Defendants. There is no equivalent background narrated in the proposed pleading for Messrs. Couchman and Montrose. They were not involved in Mr. Kalair's previous proceedings and nothing is stated in the proposed amended pleading about any background of theirs with the Defendants or the relationship between them and the Defendants.

[33] Similarly, paragraph 13 of the proposed Amended Statement of Claim describes the resolution of Mr. Kalair's underlying claim by way of settlement entered into by the Defendants on Mr. Kalair's behalf, which settlement covered the expenditures and disbursements incurred in respect of that claim. The proposed new pleading does not describe any resolution, or any state of affairs relating to the underlying matters for which the Defendants represent Mr. Couchman or Mr. Montrose.

[34] Paragraph 15 of the proposed amended claim describes how the Defendants paid themselves for Mr. Kalair's fees and disbursements out of Mr. Kalair's funds that they held in trust. The proposed amended pleading does not plead that the Defendants held any funds in trust for either Mr. Couchman or Mr. Montrose and does not describe how the Defendants were paid by Messrs. Couchman and Montrose.

[35] Paragraph 17 of the proposed Amended Statement of Claim indicates that Mr. Kalair did not have sufficient funds to obtain independent legal advice with respect to the Defendants' accounts. The proposed new pleading contains no mention of whether Mr. Couchman or Mr.

Montrose received independent legal advice and does not make any reference to their respective financial situations.

[36] Paragraph 20 of the proposed Amended Statement of Claim provides details of how Mr. Kalair was overcharged in both the rate per page and the number of pages of photocopies produced for him by the Defendants. Paragraphs 21(a) and (b) state how much each of Mr. Montrose and Mr. Couchman were charged for disbursements, and, in Mr. Couchman's case, this is juxtaposed with the amount for which he settled the claim, but provides no details as to the rate and number of pages in issue.

[37] The proposed amended pleading does not expressly state that either Mr. Couchman or Mr. Montrose was specifically overcharged for their disbursements, although the relative size of the disbursements versus their recovery is intended to suggest a disproportionate disbursement bill. The balance of the pleading is composed of more generic statements and allegations about how law firms tend to charge and overcharge for disbursements.

[38] Plaintiff's counsel says that the amended pleading states the amount that the new representative Plaintiffs were charged for disbursements, and that that single sentence is all one needs to know about this claim. He submits that the disbursements are what is at the heart of the action, and that everything else is merely background and context.

[39] Defendants' counsel submit that the amended pleading's one relevant fact about each of Mr. Montrose and Mr. Couchman – the amount of disbursement charges they each incurred – is insufficient to support the role they propose assuming. They also point out, accurately, that it is very odd to have a pleading replete with details about Omar Kalair's relationship and dealings with the Defendants even though he is no longer a Plaintiff. It is even more odd for that pleading to contain virtually no material facts about the actual Plaintiffs' relationship and dealings with the Defendants. It is as if the addition of Mr. Couchman and Mr. Montrose was an unduly hurried step that was not thoroughly considered by either of them or their counsel.

[40] While I agree that the disbursements charged by the Defendants are the crux of the claim, some material facts about the proposed representative Plaintiffs' engagement with the Defendants and their involvement in the events leading to the claim is an important feature of any pleading. As the proposed amended claim now stands, merely recounting, in a single sentence, the disbursement bill rendered by the Defendants to each of Mr. Montrose and Mr. Couchman, qualifies them as class members. But it does not qualify them as representative Plaintiffs who will be discovered on behalf of the class and will be responsible for steering the action on behalf of the class.

[41] In general, the Amended Statement of Claim is as non-informative about the two named Plaintiffs as one could imagine. When that proposed pleading is combined with their answers when asked about the litigation plan, it is evident that the two newly proposed Plaintiffs are almost entirely disengaged from the claim that they are supposedly steering. Plaintiff's counsel is essentially litigating on his own.

[42] Accordingly, the certification motion record filed by Plaintiff's counsel in June 2025 cannot possibly satisfy the requirements of section 29.1 of the *CPA*. It is not only just a partial record that is missing a litigation plan; it is a proposed class action that has no proper representative Plaintiff.

[43] I will mention that the Defendants have levelled an additional set of allegations against Mr. Kalair, arguing that he should not remain as the representative Plaintiff for reasons unique to his own litigation history. I express no views on those allegations, as there is no need to address them.

[44] As indicated, Mr. Kalair has indicated that he does not have the time to devote to being a representative Plaintiff here and so he is voluntarily dropping out of the claim. Any arguments by the Defendants about whether he should continue in that role are no longer germane to this motion. The entire issue has been superseded by his resignation and the proposal to replace him with Messrs. Montrose and Couchman.

[45] Finally, I will note here that the Defendants have moved to strike certain of the evidence put into the record by the Plaintiff and to quash the Notice of Examination issued by the Plaintiff for the Defendant, Ryan Naimark. I express no views on either of those motions, as they have lost their relevance in light of the Plaintiff's failure to sustain the action. The Plaintiff's action cannot survive without a representative Plaintiff, they did not file a final and complete motion record in accordance with section 29.1 of the *CPA*, and they are far out of time under section 29.1 to be given yet more time to find a suitable representative Plaintiff or to supplement their certification record with a litigation plan.

### **Disposition**

[46] The motion to amend the Statement of Claim and to substitute two new Plaintiffs for the original Plaintiff is denied.

[47] The action is dismissed for delay pursuant to section 29.1 of the *CPA*.

### **Costs**

[48] The Defendants were successful in bringing their motion to dismiss for delay and in responding to the motion to amend the pleading and substitute new Plaintiffs. They deserve costs in respect of those motions.

[49] Neither party was successful, as no decision was made, in the Defendants' motions to quash the Notice of Examination for Ryan Naimark and to strike evidence from the Plaintiff's motion record. There will be no costs ordered in respect of those motions.

[50] Given the multiple motions and the way that each side's counsel have packaged their Costs Outlines, it is not easy to precisely compare the two submissions. But since this is a fixing of costs and not an assessment, and the applicable standards under Rule 57.1 are more qualitative than quantitative, and since costs are in any case discretionary under section 131 of the *Courts of Justice Act*, the exercise here is more impressionistic than precise.

[51] Rounding all numbers off for convenience and using each parties' partial indemnity figures, Defendants' counsel have submitted a Costs Outline seeking \$55,700 in respect of the motion to dismiss and the motion to strike evidence. These amounts are inclusive of fees, disbursements, and HST.

[52] Using a rough estimation of time spent, I will attribute 2/3 of that amount – \$37,130 – to the motion to dismiss. Defendants' counsel have also submitted a Costs Outline seeking \$46,500 in respect of their response to the motion to amend and substitute representative Plaintiffs. That makes a total of \$83,630 for the two motions that the Defendants won.

[53] Plaintiff's counsel have submitted a Costs Outline seeking \$69,500 in respect of all of the motions, also inclusive of fees, disbursements, and HST.

[54] Rule 57.01(1)(0.a) advises me to take into account the principle of indemnity for the successful party, while Rule 57.01(1)(0.b) tempers this by advising courts to take into account the amount that the unsuccessful party might expect to incur. In addition, Rule 57.01(1)(c) and (d) respectively advise me to take into account the complexity of the proceeding and the importance of the issues, and in this case the motions were intertwined and relatively complex as well as of high importance to the parties.

[55] The Defendants' figure is somewhat higher than the Plaintiffs', but it is not so much higher as to be unexpected. Given the high stakes involved in a potential class action, it is not surprising that Defendants' counsel would 'go the distance', as it were, to challenge the Plaintiff here. All things considered, Defendants' counsel's request is a reasonable one that is fair and equitable to all parties.

[56] The Plaintiff shall pay the Defendants costs in the all-inclusive amount of \$83,630.

**Date:** February 11, 2026

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**Morgan J.**